Supreme Court, U.S.
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No. 02-183

IN THE

Supreme Court of the United States

CHARLES MICHAEL PRATER, ET AL.,
Petitioners.
v.
CITY OF BURNSIDE, KENTUCKY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

RESPONDENTS DO NOT DISPUTE THE CIRCUIT SPLIT THAT EXISTS REGARDING THE HYBRID RIGHTS THEORY SET FORTH IN *SMITH*.

Respondents (hereinafter "City") do not deny that there is a split among the Circuits regarding the very existence of a hybrid rights exception to the rule announced by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990). Rather, Respondents focus their argument on the merits of this case and argue that Petitioners (hereinafter "Church") do not establish a violation of the First Amendment and thus, there cannot be a "hybrid right" in this case. *See* Brief in Opposition at 1-3. However, this argument is more suited to the merits stage of this case should the Court decide to accept this case for review.

The City never denies the existence of the Circuit split pointed out clearly in the Church's Petition. *See* Petition at 5-13. Nor could the City deny the existence of the split among the Circuit Courts regarding this very important issue.

The City's argument is difficult to understand as it is merely a bald assertion that nothing the City has done has violated the Church's rights under the First Amendment because nothing the City has done makes it more difficult or impossible for the Church to practice its right to the free exercise of religion. Despite the fact that the Church

vigorously disputes this contention, the City's argument does not analyze the challenged action in this case under any of the traditional tests used in the Free Exercise context. It certainly does not analyze the challenged actions under a strict scrutiny analysis and offers no compelling interest for the City's challenged actions in opening and developing Summit Avenue Extended nor does it attempt to argue that the decision was advanced in the least restrictive means available. The City's bald assertion, unsupported and unexplained by any of the traditional tests used to evaluate Free Exercise claims does not mean that the Petition should be denied.

The City's argument that the Church has not established a violation of the First Amendment is different than whether the Church should be given the opportunity to attempt to establish such a violation. In its decision, the Sixth Circuit stated, "Finally, this court has rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'" *Prater v. City of Burnside*, 289 F.3d 417, 430 (6th Cir. 2002)(App., 19a)(*quoting Watchtower Bible & Tract Soc'y. of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001), *rev'd. on other grounds* 122 S.Ct. 2080 (2002)). This statement did not even give the Church the opportunity to establish a violation of the First Amendment under a hybrid rights theory, but rather held as a matter of law that the hybrid rights theory as was presented by the Church did not exist in the Sixth Circuit. Even if the Sixth Circuit rejected every one of the Church's First Amendment arguments, it is plausible that the Sixth Circuit would have found in favor of the Church had a hybrid rights theory been accepted and the City's actions been judged under a strict scrutiny standard. However, the Church was never even

given the opportunity to present such a claim because such a claim does not exist in the Sixth Circuit. All the Church seeks in this Petition is the opportunity to argue a hybrid rights theory and to analyze the City's actions pursuant to a strict scrutiny standard. It is not difficult to see that the outcome in this case might have been much different had such a standard been employed by the Sixth Circuit.

The Church is able to present a Free Exercise violation under a hybrid rights theory. If given the opportunity by this Court, the Church will argue that the City's actions in opening Summit Avenue Extended substantially burdened the Church's Free Exercise of Religion. The City had no compelling interest to open Summit Avenue Extended and certainly whatever interest the City had was not advanced in the least restrictive means available. The Church should be given the opportunity to present this argument. It was not given that opportunity, although had the Church been in the Ninth Circuit or another circuit that does recognize the hybrid rights theory, it would have been given that opportunity.

II.

THE REQUIREMENT OF THE MERITS OF THE COMPANION CLAIM TO A HYBRID RIGHTS THEORY IS IN CONFLICT AMONG THE CIRCUITS

The City argues that because the Church's Takings claim was rejected by the Circuit Court, the Church can have no hybrid right claim. However, this ignores the fact that the Church's Takings claim, as well as the other constitutional claims made by the Church, meets the standard for a hybrid

rights claim. The City argues that the Church's Takings claim is not colorable. *See* Brief in Opposition at 3-9. Essentially the City argues that the Church's Takings claim cannot even meet the lowest standard accepted by a circuit court as a threshold for the hybrid rights theory. However, the City's arguments in this regard clearly place too great of a burden on the Church and are nothing more than a *post hoc* rationalization.

It is clear that the Ninth and Tenth Circuits have clearly held that a companion claim to a Free Exercise claim in a hybrid rights context must be at least colorable to raise the level of scrutiny. *See Thomas v. Anchorage Equal Rights Comm'n.*, 165 F.3d 692, 705 (9th Cir. 1999), *reh'g granted and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000); *American Friends Service Committee Corp. v. Thornburgh*, 961 F.2d 1405, 1409 (9th Cir. 1992), *abrogation recognized on other grounds, Thomas*,165 F.3d 692, 700 n.6 (9th Cir. 1999)(recognizing that *Smith* applies to civil as well as criminal laws); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998).

Under a definition of the word "colorable", the Church has presented a companion claim worthy of appending to a Free Exercise claim to present a hybrid rights theory. Black's Law Dictionary defines "colorable" to mean, "Having the appearance of truth." BLACK'S LAW DICTIONARY 265 (6th ed. 1990). The Ninth Circuit, citing Webster's dictionary, has defined the term "colorable" to mean, "Seemingly valid and genuine." *Thomas*, 165 F.3d at 705 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 449 (1986)). As early as 1828, the term "colorable" was defined to mean, "Giving an appearance of right or justice." AMERICAN DICTIONARY OF

THE ENGLISH LANGUAGE (Webster 1828).

The Courts of Appeals have defined the term "colorable" in similarly generous language. The First Circuit has defined it as, "Seemingly valid or genuine." *BIW Deceived v. Local S6, Industrial Union of Marine & Shipbuilding Workers of America, IAMAW*, 132 F.3d 824, 832 n.4 (1st Cir.1997). The Eighth Circuit has defined the term as, "Not without some merit." *Jensen v. Schweiker*, 709 F.2d 1227, 1230 n. 2 (8th Cir.1983). Similarly, the Ninth Circuit has defined it as not "wholly insubstantial, immaterial, or frivolous." *Boettcher v. Secretary of Health & Hum. Servs.*, 759 F.2d 719, 722 (9th Cir.1985). The Tenth Circuit has defined "colorable" to mean, "Having some possible validity." *United States v. McAleer*, 138 F.3d 852, 857 (10th Cir.1998).

Indeed, the term "colorable" tracks the language used in this Court's decisions regarding awards of attorney's fees to prevailing defendants. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). As stated in the Petition, but worth repeating here, this Court has admonished against *post hoc* rationalizations that a Plaintiff has not presented a colorable claim. *See id.* at 421-22. That is the exercise in which the City engages in its Brief in Opposition. The City essentially argues that because the Sixth Circuit found against the Church on the takings claim and the other constitutional claims, the Church's arguments were not colorable. However, this Court has stated that a Plaintiff's claims are colorable and not frivolous in the attorney's fees context when the claims "deserved and received the careful consideration of both the District Court and the Court of Appeals." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

However, the Church has presented several colorable claims that are sufficient to raise the level of scrutiny under the lowest threshold requirement for a hybrid rights claim. Both the District Court and the Sixth Circuit gave careful and detailed attention to each of the Church's claims brought under the Due Process Clause of the Fourteenth Amendment, the Establishment Clause of the First Amendment, and the Takings Clause of the Fifth Amendment. The Sixth Circuit, as well as the District Court, ultimately concluded that the Church did not carry its burden on these claims, but did not decide so until after a detailed and searching inquiry and analysis on each of the claims. The District Court issued two opinions, and issued the second opinion after further briefing and argument. Likewise, the Sixth Circuit issued a twenty-three page opinion dealing with all of the Church's claims and this was done after substantial briefing and argument.

The City focuses entirely upon the Church's Takings claim brought under the Fifth Amendment but says nothing about the Church's other claims brought under the Due Process Clause of the Fourteenth Amendment and the Establishment Clause claim brought pursuant to the First Amendment. The City offers no response as to the characterization of the claims it did not address yet were brought by the Church and addressed by the District and Circuit Courts.

Under any definition of the term, the Church's constitutional claims were colorable and were not frivolous or insubstantial. This is enough to present a hybrid rights claim so as to raise the level of scrutiny and to require the City to demonstrate that the opening and development of Summit Avenue Extended was pursuant to a compelling governmental

interest that is advanced in the least restrictive means.

CONCLUSION

The existence and scope of the hybrid rights exception to the general rule of Free Exercise claims enunciated in *Smith* is clearly presented in this case. The Church merely requests that it be given the opportunity to present a hybrid rights claim and submits that this case would have been decided differently had the hybrid rights claim been accepted by the Sixth Circuit. The Circuit split as well as the resolution of the Circuit split clearly effects this case and would effect the future outcome of this case. The Petition should be granted.

Respectfully Submitted,

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